IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 14TH FEBRUARY 2007 / 25TH MAGHA 1928

SA.No. 84 of 1993()

AS.45/1991 of SUB COURT, SULTHAN BATHERY
OS.6/1988 of MUNSIFF COURT, KALPETTA
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APPELLANT:PLAINTIFF/PLAINTIFF

NEELIKANDI VALIYA POCKER
KUTTAMANGALATH, MUTTIL AMSOM
VYTHIRI TALUK.(DIED)
(ADDL.APPELLANTS 2 TO 9 ARE IMPLEADED)

ADDL.APPELLANTS
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2. K.P.PATHU, W/O.N.V.POCKER
N.V.P. HOUSE, MUTTIL P.O. WYNAD.

3. N.AYSHA, D/O.N.V.POCKER
N.V.P. HOUSE, MUTHIL P.O.
WYNAD/

4. N.KADEESA, D/O.N.V.POCKER
N.V.P.HOUSE, MUTTIL P.O. WYNAD.

5. N.NABEESA, D/O.N.V.POCKER
N.V.P. HOUSE, MUTTIL P.O. WYNAD.

6. N.ASYA, D/O.N.V.POCKER
N.V.P. HOUSE, MUTTIL P.O., WYNAD.

7. N.BASHEER, S/O.N.V.POCKER,
N.V.P.HOUSE, MUTTIL P.O., WYNAD.

8. N.ABDUL SALAM, S/O.N.V.POCKER
N.V.P. HOUSE, MUTTIL P.O. WYNAD.

9. N.SAREENA, D/O.N.V.POCKER
N.V.P. HOUSE, MUTTIL P.O.
WYNAD.

(ADDL. APPELLANTS 2 TO 9 ARE IMPLEADED AS THE LEGAL REPRESENTATIVES OF THE DECEASED APPELLANTS AS PER ORDER DT 20/6/95)

BY ADV.SRI.P.V.JYOTHI PRASAD

RESPONDENT/DEFENDANT/DEFENDANT

POTTACHOLA BAVA
ANAPPARA, MUTTIL AMSOM
VYTHIRI TALUK.

BY ADV.SRI.K.K.JAYARAJ

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 9/02/2007, THE COURT ON 14/2/07 DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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S.A. NO. 84 OF 1993

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Dated this the 14th day of February, 2007

JUDGMENT

Plaintiff in O.S.6/88 on the file of Munsiff Court, Kalpetta was the appellant. Respondent was the defendant. On the death of the appellant, additional appellants 2 to 5, his legal heirs were impleaded in the appeal. Deceased appellant filed the suit for recovery of possession of the plaint schedule building. According to plaintiff, plaint schedule building was rented out to the respondent as per an oral lease on 1.5.70 on a monthly rent of Rs.15/- and since then respondent has been in possession of the same and it was subsequently enhanced to Rs.30/- from 1.2.81 and respondent defaulted to pay the rent from January, 1984 and inspite of Ext.A1 notice dated 26.11.86 demanding surrender of the building with arrears of rent, respondent did not surrender or pay rent and therefore plaintiff is entitled to recovery of

possession as the tenancy has been terminated by Ext.A1 notice. Respondent in the written statement contended that the building was constructed by him in 1960 and since then he has been in continuous occupation of the building and he was permitted by the plaintiff to put up the homestead and since then he has been in possession of the homestead and therefore he is a kudikidappukaran entitled to protection under Kerala Land Reforms Act and he cannot be evicted. As the question of kudikidappu raised by the respondent arises for consideration in the suit, as he is bound to, learned Munsiff referred the question to the Land Tribunal under section 125(3) of the Kerala Land Reforms Act. Land Tribunal after examining the plaintiff and the defendant and marking the documents rendered a finding in R.C.30/89 that defendant is a kudikidappukaran as defined under the Kerala Land Reforms Act. On receipt of the finding, learned Munsiff examined plaintiff as PW1, defendant as DW1 and marked Exts.A1 to A3 on the side of the

plaintiff and Exts.B1 and B2 on the side of the defendant. As the finding of the Land Tribunal is binding on the trial court, learned Munsiff accepting the finding held that as defendant is a kudikidappukaran plaintiff is not entitled to the decree for recovery of possession. Plaintiff challenged the decree and judgment before Sub Court, Sultanbathery in A.S.45/91. Learned Sub Judge reappreciated the evidence, including the finding of the Land Tribunal and confirming the finding of the Land Tribunal dismissed the appeal. It is challenged in this second appeal.

2. Second appeal was admitted on formulating the following substantial questions of law.

(i) Whether the respondent is entitled for the kudikidappu right even though the plaint schedule buildings cost of construction was Rs.2,000/-.

(ii) Whether the question that the building No.63 and the building No.IV/120 is one and the same or not has to be proved by appellant eventhough the respondent puts up such a claim.

On the death of the plaintiff appellant his wife and children were impleaded as additional appellants 2 to 9.

3. Learned counsel appearing for appellant and respondent were heard.

4. The argument of learned counsel appearing for appellant was that the Land Tribunal wrongly found that respondent has been in possession of the disputed building before 1970 on the basis of Exts.B1 and B2, when respondent as DW1 both before the trial court and before the Land Tribunal admitted that the building in the plaint schedule property is VI/120 and Ext.B1 and Ext.B2 relate to house No.VI/63 and there is no evidence to prove that Exts.B1 and B2 relate to the plaint schedule building and therefore findings of courts below are erroneous. It was also argued that Exts.A2 and A3 establish that in the Panchayat building tax demand register, plaintiff is shown as registered owner of the building and it disproves the case of respondent that he constructed the building and

therefore it should have been found that respondent is not a kudikidappukaran. Learned counsel also argued that report of the Revenue Inspector shows that cost of construction of the building was Rs.2000/- and in such circumstances, it is not a hut as defined under the Kerala Land Reforms Act and therefore courts below should have granted the decree for recovery possession.

5. Learned counsel appearing for respondent argued that there is no case for plaintiff that defendant changed his residence from the plaint schedule building at any point of time after he started living there and Ext.B2 shows that a ration card was issued to the defendant to that house in 1980 and Ext.B1 voters list shows that defendant has been residing in the very same house even before 1964 and Ext.B1 establish that defendant has been residing in that building even before 1964 and therefore the case of plaintiff that plaint schedule building was granted on lease in 1970 has been disproved and the only other case is that of

the defendant that he was permitted to put up the homestead and he constructed the homestead in 1960 and he has been residing therein and that case has been rightly accepted by courts below and in the Second Appeal evidence cannot be reappreciated and therefore the appeal is only to be dismissed. Learned counsel also argued that when the case of the defendant is that he is a kudikidappukaran as he was permitted to put up a homestead and he put up the homestead in 1960, cost of construction of the hut assessed by the Revenue Inspector on the basis of the case of the plaintiff that it was constructed in 1970, cannot be relied on and in any event when it is a homestead the cost of construction is not relevant or material and no substantial question of law is involved and therefore Second Appeal is only to be dismissed.

6. It is the specific case of the plaintiff that plaint schedule building was entrusted to the defendant as per an oral lease in 1970. The case of the defendant was that there was no such

entrustment and in fact the building was constructed by their predecessor as permitted by the plaintiff in 1960 and it is a homestead and respondent has no other house or land where he could erect a homestead and therefore he is a kudikidappukaran. The number of the building was not shown in the plaint. True, Exts.A2 and A3 show that number of the building from 1986 onwards is IV/120 of Muttil Panchayat. The previous number of the building is not shown in Ext.A3. Ext.A2 only shows that building tax was paid by the plaintiff for the plaint schedule building also for the year 1988-89. Even according to plaintiff, the building was in existence atleast from 1970. He did not make any attempt to produce the previous building tax assessment register extract to show what was the number of the building during 1970 or earlier years. As rightly pointed out by learned counsel appearing for respondent, even according to plaintiff, defendant has been residing in this building from 1970 onwards. Ext.B2 ration card was

issued to the defendant for the period 1980-84 and it was issued to building No.IV/63. It is on this basis, learned counsel appearing for appellant argued that ration card was in respect of another house and not for the plaint schedule building. When plaintiff has no case that defendant was residing in another building during 1980-84, it can only be presumed, as has been rightly accepted by courts below, that it was in respect of the plaint schedule building. If that be so, Ext.B2 shows that the defendant was residing in that house and then the house number was IV/63. Ext.B1 voters list for the year 1964 shows that defendant was a voter of the very same house. It therefore conclusively prove that atleast from 1964 onwards defendant has been residing in that house. When there are only two cases, one for the plaintiff that the building was entrusted in 1970 as per an oral lease, and the other for the defendant that it was constructed by him in 1960 and it is proved that defendant has been residing therein even

during 1964, case of the plaintiff has necessarily to be disbelieved. Courts below on preponderance of probability accepted the case of the defendant. Exercising the powers under section 100 of the CPC, this court cannot interfere with that finding of fact. If that be so, it is proved that the house has been constructed by the defendant in 1960 and he has been residing therein since then.

7. Then the only question is whether defendant is a kudikidappukaran as found by the Land Tribunal and the courts below.

8. Sub section 25 of Section 2 defines "kudikidappukaran". Clause (a) deals with homestead and clause (b) with hut. As per the definition a kudikidappukaran means, a person who has neither a homestead nor any land exceeding in extent three cents in any city or major municipality or five cents in any other municipality or ten cents in any panchayat area or township, in possession either as owner or as tenant, on which he could erect a homestead. He

comes under clause (a)if he has been permitted with or without an obligation to pay rent by a person in lawful possession of any land to have the use and occupation of a portion of such land for the purpose of erecting a homestead. He comes under clause (b), if he has been permitted by a person in lawful possession of any land to occupy with or without an obligation to pay rent, a hut belonging to such person and situate in the said land. Therefore if the defendant has neither a homestead nor any land exceeding the extent provided under the section, in his possession either as owner or as tenant where he could erect a homestead and he has been permitted by a person in lawful possession of the land to have the use and occupation of a portion of such land for the purpose of erecting a homestead is a kudikidappukaran. "Homestead" has been defined under Explanation II of sub section (25) as means, unless the context otherwise requires, any dwelling house erected by the person permitted to have the

use and occupation of any land for the purpose of such erection and includes any such dwelling house reconstructed by the kudikidappukaran in accordance with the provisions of Section 79. The cost of construction of not exceeding 750/- rupees at the time of construction and the yield of monthly rent not exceeding 5/- rupees as provided under sub clause (i) and sub clause (ii) of sub clause (a) of Explanation II is relevant only in respect of a hut as contemplated under clause (b) of Sub section (25). Therefore for the reason that the cost of construction of homestead exceeds Rs.750/- and the yield of monthly rent at the time of construction exceeds Rs.5/- the claim cannot be disallowed. Therefore on the basis of the report of the Revenue Inspector estimating the cost of construction at Rs.2000/-, plaintiff is not entitled to contend that defendant is not a kudikidappuran. Moreover, the cost of construction estimated by the Revenue Inspector was on the basis that the building was constructed in 1970. When the building was

constructed a decade earlier, the cost of construction as estimated by the Revenue Inspector can only be rejected. Hence on that basis , it cannot be held that defendant is not a kudikidappukaran. The courts below rightly appreciated the facts and held that defendant is a kudikidappukaran. I find no reason to interfere with that findings.

The appeal is bereft of merits and it is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006